

Perez (Migration) [2022] AATA 4614 (28 October 2022)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Miss Angela Perez
CASE NUMBER:	2107818
HOME AFFAIRS REFERENCE(S):	BCC2020/2913578
MEMBER:	Paul Windsor
DATE:	28 October 2022
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Working Holiday (Temporary) (Class TZ) visa.

Statement made on 28 October 2022 at 1:16 pm

CATCHWORDS

MIGRATION – Working Holiday (Temporary) (Class TZ) visa – Subclass 417 (Working Holiday) – false or misleading information in a material particular – at least 3 months of specified work – waiver of requirement – decision under review affirmed

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl.417.221; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 3 June 2021 to refuse to grant the applicant a Working Holiday (Temporary) (Class TZ) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 2 January 2021. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 417.221(2)(b) of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the applicant had given, or caused to be given, false or misleading information in a material particular in relation to her application.
6. The applicant appeared before the Tribunal on 28 October 2022 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the French and English languages.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 417.221(2)(b) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
9. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

10. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
11. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
13. The applicant applied for a second Working Holiday visa (subclass 417) on 2 January 2021. In her application form, the applicant declared that she had undertaken at least 3 months of specified work as the holder or a first Working Holiday visa (subclass 417) or another eligible visa. The form states that the applicant undertook this work with Nolan Pty Ltd, trading as Nolan, with ABN: 81096869304, of 442 Ballarat Street Melbourne Victoria 3000. The form states that she was 'Appelle' picking. It indicated she worked from 20 April 2020 to 17 July 2020, working a total of 1120 hours and 103 days, and that she was employed under a piece rate agreement.
14. The Department wrote to the applicant on 4 March 2021 inviting her to comment on information in relation to her visa application. The letter explained that Department checks indicate that the specified work declared by the applicant at Nolan Pty Ltd may be false or misleading in a material particular, as the employer had verified that she worked with them from 31 August 2020 to 8 October 2020, a total of 39 days and not 103 days from 20 April 2020 to 17 July 2020 as claimed. The applicant was advised that, as there is evidence suggesting that she has provided, or caused to be provided, a bogus document or false or misleading information in relation to her visa application, she may fail to meet PIC 4020(1), with the result that the visa application may be refused. She was advised that she may provide comment on the information that is suspected of being false or misleading in a material particular, and specify if she believes there are any compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify waiver of any or all of PIC 4020(1).
15. The applicant replied on 28 March 2021 indicating that she had 'missed clarity and details'. She stated she worked picking apples on a farm in Victoria from 20 April to 17 June 2020 and also worked in the boning room at the Nolan meat factory from 31 August to 8 October 2020. She asked for clarification from the Department concerning what she must now send to the Department because that had not been specified.
16. The Department wrote to the applicant again on 28 April 2021, requesting that she provide further evidence regarding the specified work she claimed to have undertaken, including

information of all employment, payslips and bank transaction statements in order to clarify her claim to have had two employers. A checklist of requirements was included.

17. No response was received from the applicant within the specified 28 day period and the delegate refused to grant the visa on 3 June 2021.
18. The applicant did not provide any additional written submission with her review application.
19. On 22 October 2022 the applicant submitted copies of four documents along with her response to the hearing invitation. These were a rental property lease contract for accommodation in Mt Lawley, Western Australia; a work contract with Minprovisé International Pty Ltd engaging the applicant as a casual Trades Assistant in Western Australia on a Fly-in, Fly-out basis from 29 June 2022; and two prescriptions.
20. When asked at the hearing why she had not responded to the Department's request of 28 April 2022 for further evidence of the specified work she had claimed to have undertaken in 2020, the applicant said she did not respond because it was a lie and she could not lie any more. She indicated that she worked in a meat factory in Gympie, Queensland, but said she never worked picking apples. She indicated that a friend suggested she state in her application that she worked with them picking apples and she agreed to do that but it was not the case. She acknowledged it was a big mistake. By way of context, she explained that she did not wish to return to France as her father has passed away and she feels there is nothing for her there and wishes to make her future in Australia.
21. The Tribunal finds it is clear that there is evidence before the Tribunal that the applicant has given, or caused to be given, to an officer of the Department and delegate of the Minister, 'information that is false or misleading in a material particular', as defined in PIC 4020(5), that is, information that is false or misleading at the time it is given, and relevant to the criteria the Minister may consider when making a decision in relation to the visa application. The applicant has acknowledged that she included information in her visa application and in her subsequent letter to the Department of 28 March 2021, regarding having undertaken specified work, that clearly was false. The information was false in a material particular because it was information on which her eligibility for a second Working holiday visa hinged.
22. Consequently, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) be waived?

23. The requirements of PIC 4020(1) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
24. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
25. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.

26. At the hearing the Tribunal discussed with the applicant the grounds under which the requirements of PIC 4020(1) may be waived, and the documents she had submitted to the Tribunal on 20 October 2022.
27. The applicant commented that the recently submitted documents had been provided because she did not know what further documents she could provide. She added that she wanted to participate in a hearing to tell the truth and present her story. She acknowledged that her circumstances do not raise compelling circumstances that affect the interests of Australia; or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen. The Tribunal thanked her for her honesty. The applicant indicated she has a boyfriend and is renting an apartment in Australia and was thinking about making a future for herself in Australia. She indicated that, while her boyfriend is a French national and Australian permanent resident, she is not considering the option of a Partner visa at this stage.
28. Having considered the available evidence, the Tribunal finds that there are no matters that amount to compelling circumstances affecting the interests of Australia.
29. The Tribunal also does not consider that the applicant has raised matters which constitute compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen.
30. Accordingly, the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived.
31. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 417.221(2)(b).

DECISION

32. The Tribunal affirms the decision not to grant the applicant a Working Holiday (Temporary) (Class TZ) visa.

Paul Windsor
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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